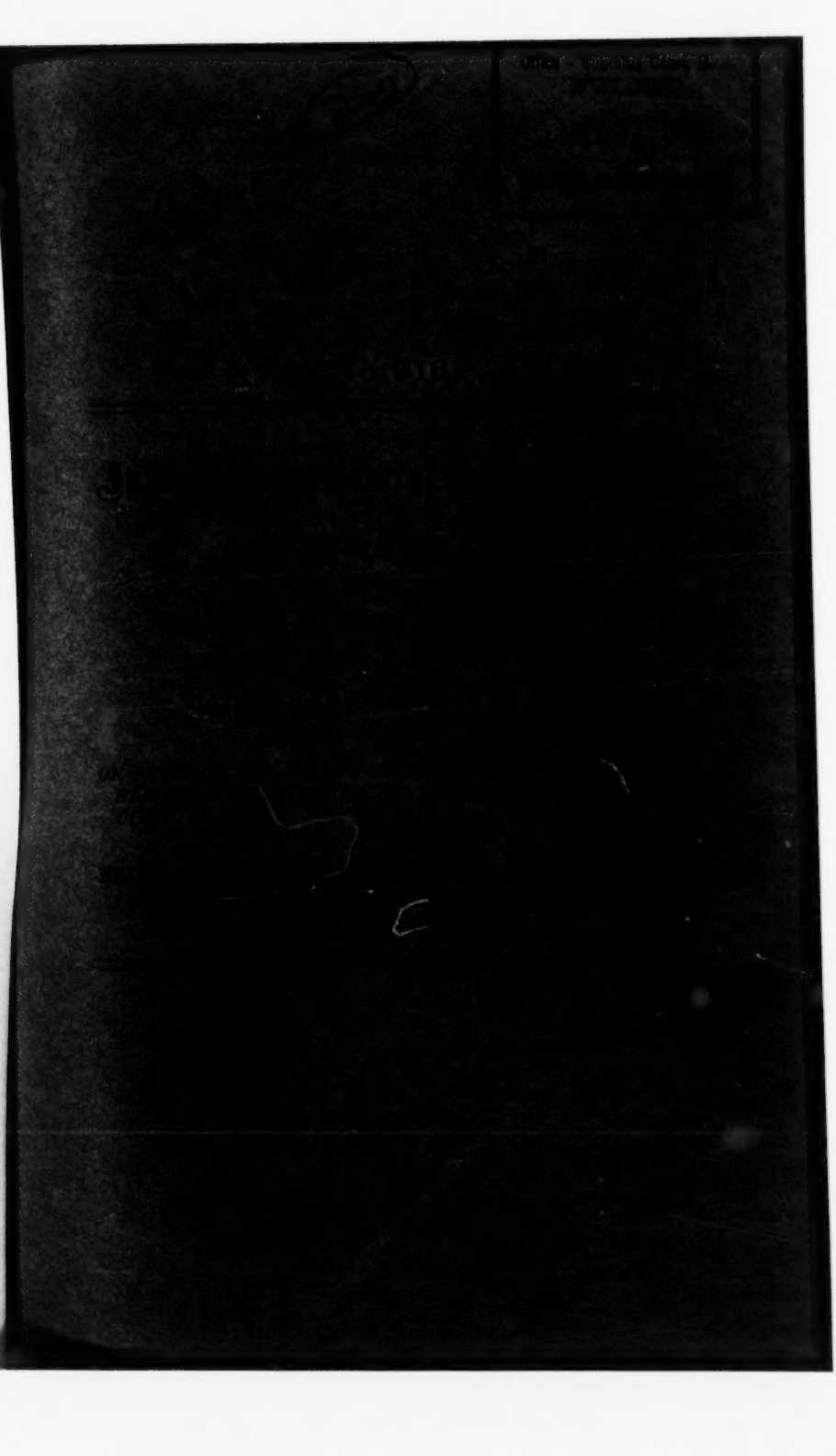

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 916

BERKSHIRE KNITTING MILLS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. XII, 4853–4865) is reported in 139 F. (2d) 134. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. XI, 4700–4787) are reported in 46 N. L. R. B. 955. The decision of the Board on its rule to show cause why its previous order in the case should not be set aside (R. X, 4129–4137) is reported in 37 N. L. R. B. 926. The decision of the court below

granting petitioner leave to adduce additional evidence (R. XII, 4803–4809) is reported in 121 F. (2d) 235. The earlier findings of fact, conclusions of law, and order of the Board (R. I, 218–303), subsequently vacated, are reported in 17 N. L. R. B. 239.

JURISDICTION

The decree of the court below (R. XII, 4866–4870) was entered on January 27, 1944. The petition for a writ of certiorari was filed on April 21, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether petitioner was accorded due process of law by the Board and the court below.

2. Whether there is substantial evidence to support the Board's finding that the strike which commenced at petitioner's plant on October 1, 1936, was caused by unfair labor practices committed by petitioner.

3. Whether the Board should have modified its normal back pay order in view of the length of time between the filing of charges by the complaining union and the issuance of the Board's final order.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., sec. 151, *et seq.*) are set forth in the Appendix, *infra,* pp. 24–26.

STATEMENT

I. The proceedings before the Board, the court below, and this Court

A complaint against petitioner having been issued by the Board on November 6, 1937 (R. I, 13–21), a hearing was held before Leo J. Kriz, a Trial Examiner of the Board, from November 29, 1937, to February 1, 1938 (R. I, 410 to VIII, 3741). After further proceedings, which are fully set forth in the Board's Decision and Order herein (R. XI, 4700–4705), the Board issued findings of fact, conclusions of law, and an order on November 3, 1939 (R. I, 218–303; 17 N. L. R. B. 239). On November 10, 1939, petitioner filed a petition for review of the Board's order in the court below (R. I. 305–322). Thereafter it filed with that court a petition for leave to adduce additional evidence in which it was alleged that Edwin S. Smith, then a member of the Board who participated in the Decision and Order of November 3, 1939, was disqualified by reason of bias, and that certain employees of the Board had acted in a manner prejudicial to petitioner (R. I. 334–402). On June 13, 1940, the court below granted a motion of the Board to continue the petition until

the hearing on the merits (R. XII, 4801–4802). Thereafter petitioner filed with this Court a motion for leave to file a petition for writ of mandamus directing the court below either to grant or deny the petition to adduce evidence prior to the hearing on the merits. This motion was denied on October 14, 1940. *Ex parte Berkshire Knitting Mills,* 311 U. S. 612.

On June 19, 1941, the court below, having heard argument on the petition to adduce further evidence and on the merits, granted the petition insofar as the activities and alleged bias of Board Member Smith were concerned (R. XII, 4803–4809). And on July 21, 1941, the court below formally remanded the case to the Board to receive evidence concerning the alleged bias of Mr. Smith and to determine whether he was disqualified from participating in the decision. It further ordered that if the Board should determine that Mr. Smith was disqualified, the case was to be reconsidered by other members of the Board who were not disqualified (R. XII, 4810). The term of office of Board Member Smith having expired on August 26, 1941, the court below, on motion of the Board, entered a resettled order on October 14, 1941, remanding the case to the Board and directing it to vacate its earlier decision, to hear oral argument, to reconsider the case, to make appropriate findings, and to enter an appropriate order (R. XII, 4813–4814).

On October 29, 1941, the Board vacated its earlier decision as well as all other actions in this proceeding in which Mr. Smith participated (R. XII, 4792–4793).[1] Having reconsidered an earlier application by petitioner for a subpena, the Board, on December 23, 1941, granted the application in part and directed the holding of a further hearing for the taking of certain evidence relating to the issue of the cause of a strike at petitioner's plant in 1936 (R. X, 4136). At the same time, the Board denied a motion by petitioner, theretofore filed, that it hear the evidence referred to in the petition to adduce additional evidence filed in the court below (R. X, 4130–4132; *supra,* p. 3). A hearing was held on January 12, 14, and 15, 1942, before Mortimer Riemer, a duly designated Trial Examiner (R. X, 4146–4465). At this hearing the Trial Examiner denied petitioner's motions to introduce some of the evidence previously rejected by the Board and the court below (R. X, 4338–4347, 4457–4465).

On January 12, 1943, the Board issued its findings of fact, conclusions of law, and the order now under review (R. XI, 4700–4787). Petitioner then filed its petition for review of this order (R. XII, 4821–4843), and the court below, on Decem-

[1] For a fuller description than is given here of the procedural steps between the remand of the case to the Board and the issuance of its decision and order of January 12, 1943, we respectfully refer the Court to that decision (R. XI, 4705–4710).

ber 1, 1943, held that the Board's order, with certain modifications not here material, should be enforced (R. XII, 4853–4865). The decree of the court below (R. XII, 4866–4870) was entered on January 27, 1944.

II. The findings, conclusions, and order of the Board

The findings of fact, conclusions of law, and order of the Board may be summarized as follows:[2]

(A) Interference, restraint, and coercion; domination and support of the Association

Petitioner is engaged at its plant in West Reading and Wyomissing, Pennsylvania, in the manufacture, sale, and distribution of women's full-fashioned hosiery. It is the largest producer of such hosiery in the country. In November 1937 it employed 5,773 employees (R. XI, 4710).

Immediately prior to a strike at petitioner's plant in 1933, called by American Federation of Hosiery Workers,[3] petitioner attempted unsuc-

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[2] Petitioner does not here challenge the substantiality of the evidence to support any of the findings of the Board except that concerning the strike of 1936. Since that finding rests primarily on the unfair labor practice findings, no reference is made in this statement to the supporting evidence.

[3] The Federation, which filed the charges herein, was then affiliated with the American Federation of Labor. At present it is affiliated with the Congress of Industrial Organizations. Branch 10 of the Federation admits full-fashioned hosiery workers employed in Berks County, Pennsylvania, to membership. Berkshire Division of Branch 10 is composed of employees of petitioner.

cessfully to establish an employees' representation plan among its employees (R. XI, 4711–4714). Following the strike, an election was held to select bargaining representatives of the employees. The Federation candidates won the election by a substantial majority, but petitioner refused to deal with the Federation as such and eventually entered into a contract with its representatives, as individuals, "for the employees they represent" (R. XI, 4714). As a result of petitioner's manifestations of preference for an unaffiliated organization and hostility to the Federation, Berkshire Employees Association, Inc., of Berkshire Knitting Mills was formed in the fall of 1933 (R. XI, 4715, 4730–4731).

The constitution of the Association was such as to render it susceptible to domination by petitioner (R. XI, 4715–4716, 4733). Both before and after the passage of the Act in 1935, petitioner assisted the Association by granting it the use of company time and premises for its activities (R. XI, 4716–4723, 4731–4732). The Association occupied part of one of petitioner's buildings as its regular office and meeting place, although like facilities were denied to the Federation (R. XI, 4716–4718, 4731–4732). Petitioner further gave the Association preferential treatment by dealing with it during the strike of 1936 while refusing to deal with the Federation (R. XI, 4734, 4748–4750). The activities of the Associa-

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tion with respect to working conditions and other matters showed that it failed to function as a free collective bargaining agent of the employees (R. XI, 4723–4730, 4733).

Following invalidation of the National Industrial Recovery Act in 1935, petitioner departed increasingly from the provisions of the N. R. A. Hosiery Code relating to working conditions. This so-called "break-down of standards" became a matter of general concern in the hosiery industry (R. XI, 4723–4724). While the Federation resisted petitioner's departures from code standards, the Association condoned and supported them and attempted to bring about their acceptance by the employees (R. XI, 4724–4727). In July 1936 the Federation decided to take vigorous steps to check the "break-down of standards" (R. XI, 4737). In the succeeding months, efforts to secure the cooperation of the Association in this endeavor were rebuffed (R. XI, 4738–4739). In September 1936 the Federation attempted to meet with petitioner to discuss the question of economic standards. At this point petitioner departed from its past practice and refused to meet with representatives of the Federation unless they were employees of the Company (R. XI, 4739–4740, 4750–4751). Its refusal, the Board found, was prompted by an intention to provoke a strike and to use the opportunity created by the strike to extirpate the Federation

as an influential force among its employees (R. XI, 4750–4753). On September 26, 1936, the Federation called a strike which commenced on October 1, 1936 (R. XI, 4740). During the strike petitioner, in furtherance of its aim to eliminate the Federation from its plant, refused to meet with the Federation and rejected all efforts at mediation by Federal and State authorities (R. XI, 4746–4747).

In addition, petitioner interfered with its employees' rights under the Act (R. XI, 4753) by, *inter alia,* forcing certain of its employees to sign a statement discrediting the Federation (R. XI, 4735–4737), engaging in surveillance of Federation meetings (R. XI, 4738, 4743–4744), and threatening to move its operations elsewhere (R. XI, 4744–4745). During the strike, petitioner paid the salaries of a large number of deputy sheriffs, some of whom engaged in acts of provocation against the strikers (R. XI, 4741–4742).

The Board found that, by the acts described above, petitioner engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. XI, 4734, 4753, 4778–4779).

(B) The cause of the strike

The strike which started on October 1, 1936, was caused and prolonged by unfair labor practices on the part of petitioner (R. XI, 4759). The Federation's aim in calling the strike was unquestionably to halt the "break-down of standards" and to restore the economic conditions

existing under the N. R. A. Code, and the demands served upon petitioner by the Federation prior to and during the strike were of an economic character (R. XI, 4754). However, had it not been for the unfair labor practices committed by petitioner, the Federation could have pursued its aims by attempting to secure the support of the employees and by establishing bargaining relationships with petitioner, rather than by strike action. From 1933 to 1936 the Federation resorted to the first of these alternatives exclusively. Its endeavors were thwarted by petitioner's unfair labor practices and particularly by the latter's domination and support of the Association, which played an important role in preventing the employees from affiliating with the Federation and in procuring acceptance by the employees of petitioner's departures from economic standards (R. XI, 4754–4756). Moreover, at the very time the Federation was considering resort to its strike weapon, petitioner engaged in unfair labor practices which were aimed at precipitating the strike (R. XI, 4756). Thus, while the "break-down of standards" provided the motive for collective activity by the Federation and petitioner's employees in 1936, the form which that activity took in October, industrial warfare, was determined by petitioner's unfair labor practices. Hence, the Board concluded, those practices were a fundamental cause

of the strike (R. XI, 4756–4759). Once begun, the strike was prolonged by further unfair labor practices on the part of petitioner, including its rejection of all settlement efforts and its policy of discrimination against active strikers (R. XI, 4756).

(C) Discrimination with respect to employment

When striking employees applied for reinstatement during the strike, petitioner adopted a policy of rejecting active strikers, effected in part by requiring strikers to be interviewed by a committee of employees concerning their activities in, and attitude towards, the strike and the Federation (R. XI, 4759–4763). Eighteen named strikers were discriminatorily refused reinstatement because of their strike activities or because their jobs had been taken by strikebreakers (R. XI, 4763–4765).[4] One employee was discharged immediately prior to the commencement of the strike and two were discharged during the strike because they gave support to other employees engaged in union activities (R. XI, 4765–4767). By these acts, the Board found, petitioner committed unfair labor practices within the meaning of Section 8 (3) and (1) of the Act (R. XI, 4765, 4767, 4778–4779).

[4] The Board dismissed allegations in the complaint of discriminatory refusals to reinstate 282 other named employees (R. XI, 4759, 4783).

(D) The Board's order

The Board ordered petitioner to cease and desist from its unfair labor practices (R. XI, 4779–4780, par. 1 (a), (c), and (d)); to withdraw recognition from and completely disestablish the Association as representative of any of its employees for collective bargaining purposes and to cease and desist from giving effect to any contract with the Association (R. XI, 4779–4780, par. 1 (b) and 2 (a); see also R. XI, 4768–4769); and to reinstate the employees discriminated against, with back pay (R. XI, 4780–4781, par. 2 (b), (c), and (d); see also R. XI, 4773). Since the strike was caused and prolonged by petitioner's unfair labor practices, the Board further ordered petitioner to reinstate any strikers who had applied for and had been refused reinstatement and to offer reinstatement upon application to strikers who had not applied for reinstatement, with appropriate provisions for back pay (R. XI, 4780–4782, par. 2 (b), (e), and (f); see also R. XI, 4774–4775).[5]

ARGUMENT

I. The alleged denial of due process

1. It is well settled that, in the absence of prejudice, irregularities in the proceedings afford

[5] The Board excepted from the provisions of the order six persons who had been convicted of unlawful conduct during the strike (R. XI, 4769–4773, 4780–4782, par. 2 (b), (e), and (f)).

no ground for setting aside an order of the Board.[6] Petitioner does not indicate the manner and extent to which it claims to have been prejudiced by the various errors allegedly made by the Board and the court below. Moreover, as we shall undertake to show, petitioner's allegations of error are without foundation in the record.

2. Petitioner contends that the Board should have heard and considered, or should have been required by the court below to hear and consider, evidence concerning Board Member Smith's alleged bias. No showing is made, however, that Mr. Smith's prior participation in this case affected in any way the record on which the present decision and order of the Board are based (Pet. 3–4, 9–10, 16–17). He took no part in the compilation of testimony and other evidence before the Trial Examiner at the first hearing. The record made at that hearing, therefore, could properly be considered by the reconstituted Board. Mr. Smith ceased to be a member of the Board on August 26, 1941 (R. XII, 4811–4812); and the Board's decision was issued on January 12, 1943

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[6] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350–351; *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586, 589 (C. C. A. 2); *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888, 889 (C. C. A. 5); *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905, 909 (C. C. A. 6), certiorari denied, 312 U. S. 689; *Wilson & Co.*, v. *National Labor Relations Board*, 103 F. (2d) 243, 245 (C. C. A. 8).

(R. XI, 4700–4789). In these circumstances, as the court below held (R. XII, 4854), there was no reason "why attention should have been deflected from this proceeding to examine the alleged bias of the former member." (See also the Board's Decision on Order to Show Cause, R. X, 4131–4132.)

3. The evidence other than that pertaining to Mr. Smith, described in the petition to adduce evidence (*supra,* p. 3), which petitioner has repeatedly sought to include in the record in this case (Pet. 3–5, 6–7, 9, 14, 16–17, 18), has twice been considered and rejected by the court below (R. XII, 4795–4797, 4854).[7] These rulings, we submit, were clearly correct. The fact that a review attorney may have had access to memoranda and files of the Board which were not part of the record in the case (R. I. 400–401; Pet. 4) is no basis for assuming that such memoranda and files improperly influenced the Board's decision. As the court below noted, the review attorney "is not the responsible fact finder; the Board is" (R. XII, 4795–4796). The broad allegation that "material evidence was knowingly suppressed [by the Board] which would have shown that the strike was caused solely by economic issues and not

[7] None of the evidence proffered in the petition to adduce sustains petitioner's assertion that Mr. Smith and his subordinates "made special efforts to see 'that a case was made out' against the petitioner" (Pet. 4).

unfair labor practices" (Pet. 16; see also pp. 4, 6, 14) refers to memoranda in the Board's files which disclose that agents of the Board and officials of the Federation expressed the opinion, before the Board's investigation was made, that the cause of the strike was of an economic character and that it was doubtful whether charges of unfair labor practices could be sustained (R. I, 386–389). Petitioner's contention that the Board should have introduced these memoranda in evidence is manifestly without substance. These documents contained mere expressions of opinion upon matters which could be decided only by the Board itself.[8] Moreover, as the court below observed (R. XII, 4797):

> it would be utterly impracticable and undesirable to open up all the records and files of a public officer, a board, or a court to examine all the documents or other communications which had passed between either members or employees of one of them prior to the conclusion upon any particular subject.

For reasons of space we refrain from discussing the remainder of the evidence offered in the peti-

[8] Indeed, not even a prior administrative decision by the Board itself can prevent the Board from subsequently reconsidering the matter and reaching a contrary result. *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. (2d) 51, 54–55 (C. C. A. 4), certiorari denied, No. 735, this Term.

tion to adduce, and respectfully refer the Court to the able disposition of this matter made by the court below (R. XII, 4795–4797).

4. Petitioner bases its contention of misconduct by the Trial Examiner at the first hearing on some 12 references to a printed record of 3,332 pages (Pet. 2, 10, 18). Examination of the portions of the record referred to will reveal no improper conduct on the part of the examiner. Even if it were shown that some of his rulings were doubtful, petitioner's sweeping allegation of bias would still be unsupported. *Berger* v. *United States,* 255 U. S. 22, 31. Moreover, petitioner makes no attempt to show that it was prejudiced by any of the rulings in question. See cases cited *supra,* p. 13, n. 6.

Illustrative of the insubstantial nature of petitioner's allegations is its complaint that the Trial Examiner admitted documents into evidence without looking at them (Pet. 2, 18). The documents had already been described, and the objections to their admission were based not on the accuracy of the description but on the relevance of the documents as described (R. II, 683–687; V, 2173–2175). Under these circumstances examination of the documents obviously would have served no useful purpose.

The court below, upon examination of the record, concluded (R. XII, 4857):

without indicating an agreement with the trial examiner in all the rulings, we think his attitude was fair and impartial to both sides under conditions which it is understatement to describe as difficult.

5. Petitioner's objections to the rulings of the Trial Examiner at the second hearing, insofar as they are based on his exclusion of evidence contained in the petition to adduce (Pet. 6–7, 18), have already been dealt with (*supra,* pp. 13–16). The Trial Examiner's allegedly erroneous rulings with respect to examination of the minutes of the Federation (Pet. 7, 18) were entirely proper. The subpenas under which the minutes were produced were drawn in precisely the words used in petitioner's application therefor; that is, they called for "such portions of the minutes * * * as are relevant to the allegation in the Board's complaint that said strike [of 1936] was caused by unfair labor practices on the part of [petitioner]" (R. X, 4140–4144). The Trial Examiner accordingly required production only of the relevant minutes (R. X, 4171–4178). Petitioner is in no position to complain against the Board's compliance with its own request. An order directing the production of all of the Federation's minutes would have constituted a wholly unwarranted "fishing expedition" into the Federation's internal affairs. Moreover, petitioner was in no respect prejudiced by the rulings. As we shall

show later (*infra*, pp. 20–21), the Board, in deciding the question of the cause of the strike, took into consideration the fact that the declared aim of the strike was economic. The only purpose which the minutes could have served was to prove that undisputed fact.

Petitioner's objection to the Trial Examiner's admission of copies of original minutes (Pet. 7) is likewise without merit. The absence of the originals was accounted for (R. X, 4211, 4391–4392, 4443), the copies were "the kind of evidence on which responsible persons are accustomed to rely in serious affairs" (*National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585), and petitioner has not shown that it was prejudiced by these rulings.

6. Petitioner contends that it has been denied due process of law because of the allegedly inordinate length of time it has taken to dispose of this case (Pet. 10, 19). As the court below pointed out, petitioner "makes no charge that the delay was intentional or designed to prejudice its position" (R. XII, 4854). It noted, also, that "the case has been vigorously contested at every stage of the proceedings by [petitioner]" (R. XII, 4853–4854). We submit, therefore, that the court below was right in holding that the delay, while

greatly to be regretted, cannot be characterized as a denial to petitioner of due process of law. (*Ibid.*)

7. Petitioner further contends (Pet. 19) that the court below erred in postponing disposition of the petition to adduce until the original hearing on the merits (*supra,* pp. 3–4). Petitioner makes no effort to show that this action of the court was an abuse of its sound discretion. *Ex parte Bradstreet,* 8 Pet. 588, 590. As the court noted (R. XII, 4795):

> After-events proved that the procedure was a wise one because the problems presented in the petition to adduce fall into perspective when viewed in the light of the main case.

The only prejudice which petitioner claims as a result of this action is that, if it had not been taken, the evidence concerning the alleged bias of Board Member Smith would have been received (Pet. 19). As we have shown, petitioner was in no way prejudiced by the failure to hear that evidence.

8. The court below gave careful attention to each of petitioner's claims in support of its contention that it was denied a fair hearing (R. XII, 4853–4857). We submit that its decision was correct and raises no question of importance requiring review by this Court.

II. The cause of the strike

9. The factual basis upon which the Board concluded that the strike was caused and prolonged by unfair labor practices on the part of petitioner is set forth above (*supra,* pp. 6–11). The decision of the court below in sustaining this finding as supported by the evidence is in accord with its prior decisions as well as those of other circuit courts of appeals.[9] There are no contrary decisions.

In challenging this finding (Pet. 20–22) petitioner relies almost exclusively on evidence tending to show that the strike was called for economic reasons. The Board gave full consideration to this evidence (*supra,* pp. 9–10; R. XI, 4754). It examined the factors which determined the employees' choice of collective action in order to achieve their ends, and concluded (R. XI, 4757) that the employees' resort to a strike was the

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[9] *Republic Steel Corp.* v. *National Labor Relations Board,* 107 F. (2d) 472, 478 (C. C. A. 3), modified on another point, 311 U. S. 7; *National Labor Relations Board* v. *Elkland Leather Company, Inc.,* 114 F. (2d) 221, 225 (C. C. A. 3), certiorari denied, 311 U. S. 705; *Great Southern Trucking Co.* v. *National Labor Relations Board,* 127 F. (2d) 180, 186 (C. C. A. 4), certiorari denied, 317 U. S. 652; *National Labor Relations Board* v. *Barrett Co.,* 135 F. (2d) 959 (C. C. A. 7); *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 872 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585.

consequence of petitioner's illegal conduct. The Board found that the course of conduct pursued by the petitioner resulted in the evil which Congress recognized in Section 1 of the Act:

> The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, * * *.[10]

Nothing in the petition or the record offers any basis for rejecting the Board's conclusion.

Petitioner's further contention that the record discloses no more than "isolated incidents" of illegal conduct prior to the strike (Pet. 2, 20) is refuted by the Board's finding, supported by the evidence, of petitioner's long-continued and pervasive policy of preventing unionization of its employees (*supra,* pp. 6–9).

III. The back pay order

10. Petitioner contends that the period for which it is required to pay back pay to the employees injured by its unfair labor practices should be reduced because of alleged delays on the part of the Board and the Federation (Pet. 11, 22–23). As has been noted, the Board was not guilty of unwarranted delays, and petitioner makes no at-

[10] See also *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42.

tempt to show that any delays were attributable to the Federation.[11]

Petitioner correctly notes that the Board's order must be remedial rather than punitive (Pet. 22). *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7. The Board's order here is remedial; petitioner makes no effort to show that it is punitive. Only an award of full back pay can undo the effects of petitioner's unfair labor practices. Clearly, as between petitioner, which caused the loss of wages, and the victims of its unlawful conduct, the loss should be borne by the former. Such was the holding of this court in *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.,* 315 U. S. 685, 698.[12] A petition for certiorari based on identical

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[11] Petitioner's reliance on *National Labor Relations Board* v. *Crowe Coal Company*, 104 F. (2d) 633, 640–641 (C. C. A. 8), certiorari denied, 308 U. S. 584 (Pet. 23), is misplaced. That case dealt with delays on the part of complaining labor organizations or employees. See also *National Labor Relations Board* v. *William Davies Co.*, 135 F. (2d) 179, 183–184 (C. C. A. 7), certiorari denied, 320 U. S. 770.

[12] Cf. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 583; *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 597 (C. C. A. 9); *National Labor Relations Board* v. *Wm. Davies Co.*, 135 F. (2d) 179, 183–184 (C. C. A. 7), certiorari denied, 320 U. S. 770; *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. (2d) 633, 636 (C. C. A. 2); *National Labor Relations Board* v. *Bachelder*, 120 F. (2d) 574, 579 (C. C. A. 7), certiorari denied, 314 U. S. 647; *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. (2d) 903, 915 (C. C. A. 8); *Triplex Screw Co.* v. *National Labor Relations*

grounds was recently denied by this Court in *National Labor Relations Board* v. *American Creosoting Co., Inc.*, 139 F. (2d) 193, 196 (C. C. A. 6), certiorari denied, No. 756, this Term.

CONCLUSION

The decision below is correct, and no questions warranting review are presented. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MAY 1944.

Board, 117 F. (2d) 858, 862 (C. C. A. 6); *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. (2d) 202, 206 (C. C. A. 2), affirmed 313 U. S. 177, 200.